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BOOK REVIEWS

ENRAGED OVER PUNISHMENT: ONE JUDGE'S CALL FOR SENTENCING REFORM

THOMAS R. BURTON, III*

A RAGE TO PUNISH, By LOIS G. FORER. New York: W.W. Norton & Company. 1994. Pp. 204.

I will never forget the fear the new principal of Poquonock Elementary School impressed upon me the first day of fourth grade. He sternly told the student body that the policy for disobeying our teachers would be "three strikes and you're out!" We were too fearful to ask what we would be out of, but his mandate sure kept the fourth grade in line. Years later, the policy that governed my elementary school conduct has swept through popular political opinion with Presidential hopefuls Bob Dole and Phil Gramm preaching "three strikes and you're out" regarding lifetime sentences for repeat criminal offenders.¹ In fact, the vast majority of Americans support the death penalty, and some even believe that the rattan cane is proper punishment for minor crimes.² However, Lois G. Forer, author of *A Rage to Punish*, assaults the reader from the opposite end of the sentencing spectrum with a critique of mandatory sentencing laws that contravenes popular opinion and my former principal.³

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¹ Nkechi Taifa, "Three Strikes-and-You're Out"-Mandatory Life Imprisonment for Third Time Felons, 20 U. DAYTON L. REV. 717, 718 (1995) (for discussion history, current status and flaws of "three strikes and you're out" legislation); see Kathleen Kahn, *The Crime of Cracking Down*, SAN FRAN. CHRONICLE, Aug. 14, 1994, at Sunday Review 8; David Bauman, *Whitman Says National Must Fine-Tune Jailing of Juveniles, Adults*, GANNETT NEWS SERVICE, July 19, 1995, 1995 WL 2901724 at 1, 2 (In June of 1995 New Jersey Governor Christine Todd Whitman signed into law a three strikes policy); see also Stephen Chapman, *Criminal Behavior in the Drug War, Toughness Has Become Stupidity*, CHI. TRIB., February 9, 1995, at 27.

² Yale Kamisar, *For This Judge, Prison was the Punishment of Last Resort*, CHI. DAILY L. BULL., July 19, 1994, at 2.

³ LOIS G. FORER, *A RAGE TO PUNISH* (1994).

Forer grounds her critique on sixteen years of experience as a judge in Philadelphia's trial court of general jurisdiction.⁴ Her experience demonstrated the woeful inadequacies inherent in the present system of mandatory sentencing. In fact, an experience with mandatory sentencing drove her to resign from the bench. Forer faced a defendant who, in an act of desperation after losing all sources of income, robbed a cab driver of fifty dollars at toy pistol-point.⁵ Mitigating factors, such as the fact that the defendant was married with a child and the robbery was his first offense, convinced Forer to sentence the man to a short prison sentence, a long probation, and repayment of the fifty dollars.⁶ Even the victim agreed with the sentence.⁷ However, the Pennsylvania Supreme Court ruled that under the state mandatory sentencing statute, the first time offender must serve five years in prison.⁸ Forer describes her reason for leaving after the ruling: "Faced with the choice of violating a court order or imposing a sentence that I believed was contrary to long-established principles of justice and fairness, I left the bench."⁹

Through her sixteen years on the bench, Forer developed her own sentencing system radically different than the mandatory sentencing laws implemented in the last twelve years.¹⁰ Forer states that our present sentencing system is rooted in punishing the individual, whereas she advocates a sentencing philosophy fueled by public safety concerns.¹¹ She believes that we are motivated by a rage to punish. The rage to punish grows from the religious philosophy that crime is sin. Combined with the tenet that all people have free will, the result is that those who commit crimes voluntarily sin; thus, they must be punished as sinners.¹² The rage to punish is so pervasive that people who pose

⁴ *Id.* at 1-2.

⁵ *Id.* at 2-4.

⁶ *Id.* at 3.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 4.

¹⁰ See Kristen K. Sauer, *Informed Conviction: Instructing the Jury about Mandatory Sentencing Consequences*, 95 COLUM. L. REV. 1232, 1235 (1995); Julia L. Black, *The Constitutionality of Federal Sentences Imposed Under the Sentencing Reform Act of 1984 After Mistretta v. United States*, 75 IOWA L. REV. 767, 769 (1990) (In 1984 Congress passed the Sentencing Reform Act in an attempt to set up a fairer and more determinate sentencing system).

¹¹ FORER, *supra* note 3, at 122; see generally ABE FORTAS, *DISSENT AND CIVIL DISOBEDIENCE* 32 (1968) (for the proposition that punishment must be meted out).

¹² FORER, *supra* note 3, at 28.

no threat to the public are frequently jailed, prisons are overcrowded, and the taxpayer spends more money supporting convicts than educating the nation's youth.¹³ Due to staggering prison overcrowding, the need for reform clearly exists, and without suggestions for change, our flawed system will simply perpetuate itself.¹⁴

Lois Forer offers a refreshing view that advocates sweeping change in sentencing laws. She rejects the "just deserts" theory, and instead, promotes a theory based on rehabilitation.¹⁵ Her sentencing theory embraces safety for the public, probation for the non-dangerous criminal, and reparations to the victims.¹⁶ In addition to the shift from punitive sentencing to rehabilitative sentencing, the second major distinction between mandatory sentencing laws and Forer's theory is that under Forer's theory the judge maintains discretion to choose an appropriate sentence.¹⁷ Before examining whether Forer's theory presents a realistic solution to problems created by mandatory sentencing, the history of mandatory sentencing laws is appropriate.

I. BACKGROUND

Congress passed the Sentencing Reform Act (SRA) in 1984.¹⁸ The intent of the SRA was to create fairer and more determinate sentencing than the former system which was based on rehabilitation theories.¹⁹ Along with the goal of reducing sentencing disparities created by judicial discretion, the four major purposes of the SRA were: 1. respect for the law and just punishment, 2. adequate deterrence, 3. protection from further crimes by the defendant, 4. rehabilitation.²⁰ Since 1984, Congress has passed mandatory minimum sentences for serious crimes and drug offenses.²¹ In fact, at the federal level, all crimes are now

¹³ *Id.* at 7.

¹⁴ Marc Miller, *Purposes at Sentencing*, 66 S. CAL. L. REV. 413, 415 (1992).

¹⁵ FORER, *supra* note 3, at 122-23. Calls for rehabilitation are making a comeback as prison wardens across the nation call for repeal of mandatory minimums and the expansion of rehabilitation programs in prisons. *New Simon Survey Shows Wardens Dispute Politicians' Answers on Crime, Prison Policy*, U.S. NEWS AND WORLD REPORT, Dec. 21, 1994, 1994 WL 11129227 at 2-3.

¹⁶ FORER, *supra* note 3, at 122-23.

¹⁷ *Id.* at 64.

¹⁸ 18 U.S.C. §§ 3551-3559, 3561-3566, 3571-3574 (1988); 28 U.S.C. §§ 992-996 (1993); Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1685 (1992).

¹⁹ Black, *supra* note 10, at 769; see Freed, *supra* note 18, at 1689.

²⁰ 18 U.S.C. § 3553(a)(2) (1988).

²¹ Miller, *supra* note 14, at 433.

punishable by mandatory sentences, mandatory minimum penalties, or narrowly guided sentencing ranges.²² States followed suit by enacting mandatory minimums that resulted in prison overcrowding.²³ These mandatory minimums adhere to the same goals of the SRA.²⁴ However, goals such as just deserts fall under Forer's scrutiny.²⁵

II. JUST DESERTS UNDER MANDATORY SENTENCING VERSUS FORER'S REHABILITATIVE SOLUTIONS

Current sentencing policy reflects a preference for retributive justice; the theory that one should get his "just deserts" for the crime committed is at the heart of mandatory sentencing.²⁶ Marc Miller writes that reformers of the old system criticized indeterminate sentencing systems and, "offered in its place some version of just deserts as the primary organizing principle for sentencing."²⁷ The "just deserts" model emerged because rehabilitation failed as a criminal sentencing guide.²⁸ William Selke argues that the writings of scholars and highly respected criminologists fueled a national movement away from the rehabilitative sentencing theory.²⁹ These writings indicated that rehabilitation failed, and that rehabilitation theory results in lenient sentences.³⁰

However, the "just deserts" theory contains flaws which warrant a shift back toward the rehabilitative sentencing theory that Forer advocates. First, "just deserts" is too much the product of political and popular opinion, rather than of principle.³¹ Selke maintains that crime

²² Sauer, *supra* note 10, at 1235.

²³ *Id.*; Miller, *supra* note 14, at 415.

²⁴ Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185, 192 (1993).

²⁵ FORER, *supra* note 3.

²⁶ Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CAL. L. REV. 61, 63 (1993) (current sentencing policy reflects preference for retributive justice, with punishment commensurate with the seriousness of each type of offense).

²⁷ Miller, *supra* note 14, at 431.

²⁸ *Id.*; WILLEM DE HAAN, *THE POLITICS OF REDRESS: CRIME, PUNISHMENT, AND PENAL ABO-LITION* 5-6 (1990) (Intellectuals for law and order have advocated a 'new realist' criminology which dictates that rehabilitation of offenders does not work, and that punishment by imprisonment is what will effectively reduce crime); see Michael Tonry, *Sentencing Reforms and Racial Disparities*, 78 JUDICATURE 118, 119 (Nov.-Dec. 1994) ("just deserts" filled rationale for sentencing in absence of rehabilitation theories).

²⁹ WILLIAM L. SELKE, *PRISONS IN CRISIS* 24-25 (1993).

³⁰ *Id.*

³¹ Miller, *supra* note 14, at 414; see Lowenthal, *supra* note 26, at 123 (severity of mandatory

control is a very safe topic for the politician to emphasize, and that the solutions the politician presents seem cheap and easy.³² Due to widespread agreement that to control crime there must be more imprisonment and death penalty statutes, the politician simply feeds into popular opinion, rather than searching for effective alternatives.³³

Second, mandatory sentencing geared toward punishing the offender results in prison overcrowding; thus, the costs of maintaining prisons and their inmates spiral upward without restraint.³⁴ Gary Lowenthal gives three reasons why mandatory sentencing contributes to prison overcrowding:

First, elimination of trial court discretion. . . increases the percentage of arrested offenders who are sentenced to prison. Second, the average sentence imposed in court for persons imprisoned with mandatory enhancements is much longer than the average sentence for offenders sent to prison without them. Third, even when courtroom sentences are equal, the actual period of confinement for persons sentenced with mandatory enhancements is normally longer. . . ."³⁵

As a result, the United States has by far the world's highest known rate of incarceration, with over one and a half million prisoners.³⁶ The total cost of incarcerating Americans in prison was 20 billion dollars in fiscal year 1994.³⁷

A third criticism of the "just deserts" mandatory sentencing policy is that it fails to prevent future crimes by potential offenders.³⁸ The reason why mandatory minimums do not prevent crime by those people not incarcerated is that people, when committing a crime, simply do not think through the consequences of that crime. Selke, in exam-

punishment presents difficult political issue, what legislator wants to appear soft on crime by decreasing penalties for offenses involving violence, drugs); Kahn, *supra* note 1; cf. Bauman, *supra* note 1, at 1 (New Jersey Governor Whitman dismissed politically popular trend to jump on get tough on crime bandwagon).

³² SELKE, *supra* note 29, at 117.

³³ See *id.*; Sauer, *supra* note 10, at 1236.

³⁴ Lowenthal, *supra* note 26, at 72.

³⁵ *Id.*

³⁶ Richard Lacayo, *The Real Hard Cell*, TIME, Sept. 4, 1995, at 31. Furthermore, prison populations have doubled in the last ten years. *Id.*

³⁷ *Id.* at 31.

³⁸ FORER, *supra* note 3, at 71-72. In Pennsylvania between 1985 and 1990 crime increased by 6 percent, but the prison population increased by 171 percent. *Id.* Severity of punishment has not reduced crime, but it has increased the prison population. *Id.*

ining Nordic Criminology, notes that crime is significantly affected by social and economic factors, such as the labor market and health, education, and welfare policies.³⁹ For people who are socially and economically disadvantaged, prison is no worse than their present situation.⁴⁰ These people are not likely to consider the consequences of their actions. Thus, without the consequences considered, mandatory minimums cannot deter crime.⁴¹

Forer's alternative theory, based generally on rehabilitation of the offender, seems to offer a compelling answer to the ills of mandatory sentencing. The strongest argument in favor of her philosophy is that it worked in her courtroom.⁴² She strove to rehabilitate non-dangerous criminals by paroling them upon the condition that they participate in programs for the purpose of rehabilitation.⁴³ Furthermore, she ordered reparations to compensate the victims of crime.⁴⁴ The results were compelling: less than twenty percent of the criminals she sentenced to probation and reparations were rearrested; thus, her method rehabilitated criminals.⁴⁵ Moreover, crime was deterred more effectively than under the "just deserts" theory because, among those people she sentenced to probation and reparations, significantly less committed additional crime. Finally, her theory alleviates prison overcrowding because only people dangerous to public safety are sentenced to prison terms. The use of prison as a last resort protects the public while also reducing overcrowding.⁴⁶

The success of Forer's sentencing philosophy in other courtrooms is further evidence of its applicability.⁴⁷ For example, Judge Noonan of the Ninth Circuit maintains alternative sanctions may be sufficient even though they depart from the guidelines. In writing about *United States v. Takai*,⁴⁸ where a first time offender attempted to secure a green card by bribing an immigration official, the judge stated: "the sentence

³⁹ SELKE, *supra* note 29, at 48.

⁴⁰ *See id.*

⁴¹ *See* FORER, *supra* note 3, at 63.

⁴² *See id.* at 123-24.

⁴³ *See id.* at 133-34.

⁴⁴ *See id.* at 124.

⁴⁵ *Id.* Among the inventive rehabilitation programs Forer advocates is "Choice." Choice supervises young people in their homes, not institutions, and the rate of re-arrest for youth in this program is much less than others with similar backgrounds who do not participate in the program. FORER, *supra* note 3, at 160.

⁴⁶ *See* FORER, *supra* note 3, at 124.

⁴⁷ Miller, *supra* note 14, at 460-61.

⁴⁸ 930 F.2d 1427 (9th Cir. 1991).

actually imposed was salutatory and sharp, involving substantial fines, a period of confinement at home and a substantial period of probation.”⁴⁹

However, Forer’s sentencing philosophy is not without serious criticism. First, her rehabilitative theory using probation and reparations is not novel. The rehabilitation theory was in vogue during the 1960s and 1970s.⁵⁰ Under this theory, the criminal justice system perceived crime as indicative of some underlying problem in the offender.⁵¹ The justice system’s ultimate objective was to diagnose the problem, whether it be biological, genetic, or social, and develop an appropriate strategy.⁵² Furthermore, probation as a system has improved over the last twenty years, and it has been used as a method to attempt the rehabilitation of offenders.⁵³ In addition, rehabilitative theory using prisons as a last resort has been the focal point of Scandinavian Criminology for many years.⁵⁴

The most damning critique of Forer’s rehabilitative approach is that by 1984, when the Sentencing Reform Act was passed, the criminal justice system’s goal of rehabilitating offenders had failed.⁵⁵ The chief reason why Congress passed sentencing reform, which incorporated mandatory sentences under a “just deserts” theory, was because Congress believed that rehabilitation theories failed.⁵⁶ It seems that while Forer’s rehabilitative approach may have experienced success within the microenvironment of her courtroom, rehabilitation theory simply fails on a nationwide scale.

Within Forer’s rehabilitation construct, implementing reparation payments presents practical problems. First, what if the criminal cannot pay restitution? Forer never answers that question for the reader.⁵⁷ Furthermore, she never addresses the problem of whether the victim could sue the offender in civil court for damages once the victim receives reparations from the criminal court. What if the victim believed he or she was undercompensated? Must the victim settle for what

⁴⁹ Miller, *supra* note 14, at 461.

⁵⁰ Steve Wilson, *Do We Punish Criminals for Deterrence, Justice or Revenge?*, THE ARIZ. REPUBLIC, July 16, 1995, at A2.

⁵¹ SELKE, *supra* note 29, at 11.

⁵² *Id.*

⁵³ *Id.* at 131.

⁵⁴ See *id.* at 49.

⁵⁵ See Miller, *supra* note 14, at 435.

⁵⁶ *Id.*

⁵⁷ See FORER, *supra* note 3, at 134 (while she never answers the question, she does indicate that she required offenders to find a job and pay reparations over time from their salary).

Forer thought was proper? Shouldn't the victim have the option between judge or jury when seeking reparations?

Forer's position that prison be reserved for only violent offenders is not without support. Selke argues that clearly the public is not threatened by a non-violent offender.⁵⁸ Moreover, by keeping non-violent offenders out of prison, they will be less likely to threaten society, because they will not be influenced by contact with violent offenders.⁵⁹ Moreover, limiting prison to violent offenders eases overcrowding and saves money, while stimulating alternative methods of correction.⁶⁰ Finally, Scandinavian countries such as Denmark have successfully implemented justice systems that minimize crimes for which incarceration is warranted, and they have increased alternatives to the prison sanction.⁶¹

Yale Kamisar offers the most practical criticism of the public safety aspect to Forer's sentencing theory. Kamisar argues that even if prison sentencing philosophy shifts to public safety, judges will likely lock up as many criminals because they are "dangerous" as under the current retributive system.⁶² The line between crime that threatens public safety and crime that does not is unclear. Furthermore, many people would rather see non-violent criminals imprisoned in order to prevent the criminal from repeating the crime, at least for the criminal's jail term. For example, while car theft may not threaten public safety, its inconvenience causes the justice system to imprison car thieves. At the very least, this incarceration prevents a particular thief from stealing another car for the period of his jail term.

Second, Forer's public safety theory, while sensible to reduce prison overcrowding, is inconsistent with her goal of rehabilitation. By sentencing violent offenders to prison, Forer concedes that these offenders cannot be rehabilitated. Because they are jailed, they will not benefit from a system of probation and reparations designed to address the criminal's social or psychological problems. Thus, Forer's sentencing theory is inconsistent.

While Forer's sentencing theory alleviates many of the problems created by a "just deserts" mandatory sentencing regime, in order for her theory to be truly successful, it must make the transition from a micro, single courtroom scale, to a macro, national scale. However, past

⁵⁸ SELKE, *supra* note 29, at 122.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 110-11.

⁶² Kamisar, *supra* note 2.

national practice indicates that rehabilitation theory failed. Perhaps the best way to implement rehabilitation theory is outside of the criminal justice system. Scandinavian countries, such as Denmark, abandoned rehabilitation goals within their criminal justice system.⁶³ Instead, they incorporate rehabilitation methods into social and economic reform outside of the criminal justice system.⁶⁴ Whether or not rehabilitation theories can be implemented outside of our criminal justice system is unclear. This is because American society allows for greater social and economic disparities among classes in the name of individual freedom, whereas Scandinavian society stresses greater social and economic equality that de-emphasizes materialistic goals.⁶⁵

III. THE QUESTION OF JUDICIAL DISCRETION

Forer's sentencing theory advocates a return to judicial discretion in sentencing offenders. However, mandatory sentencing laws were passed in part because indeterminate sentencing policies resulted in so much judicial discretion that similarly situated criminals received vastly different sentences.⁶⁶ For instance, Daniel Freed comments on the inequitable nature of judicial discretion:

[S]ome judges began at the bottom of the statutory range and adjusted sentences upward. . . . Other judges started at the top, on the theory that every convicted offender earned the maximum penalty. . . , subject to mitigating circumstances. . . . Still others began at midrange, or at some other intermediate point, working up or down, as aggravating or mitigating circumstances surfaced.⁶⁷

Inconsistent sentencing and a lack of guidelines concerning the effect of mitigating factors prompted Congress to institute mandatory guidelines and mandatory minimum sentences.⁶⁸

⁶³ SELKE, *supra* note 29, at 49.

⁶⁴ *Id.* at 49–50.

⁶⁵ See SELKE, *supra* note 29, at 48. Selke includes comment from Kyvsgaard who argues fundamental societal differences between the United States and Scandinavia contribute to criminology differences. See *id.* Scandinavian countries can implement rehabilitation theories into their social reform, because they believe in social and economic equality as a means to reduce crime. See *id.* Whereas in America, individual freedom fails to stress social equality, reform cannot succeed on a social level because economic equality is undervalued. See *id.*

⁶⁶ Black, *supra* note 10, at 769.

⁶⁷ Freed, *supra* note 18, at 1688.

⁶⁸ See Hatch, *supra* note 24, at 187.

The second major argument against Forer's position is that judicial discretion results in a greater disparity in sentencing between whites and blacks.⁶⁹ Studies done by the United States Sentencing Commission indicate that black drug defendants receive substantially longer average prison terms than whites who commit comparable crimes.⁷⁰ Thus, affording judicial discretion may result in racist sentencing practices.

However, mandatory minimums are subject to the same criticisms as indeterminate sentencing. First, mandatory sentencing lacks the uniformity it sought to achieve; thus, its practices are also inconsistent.⁷¹ This type of sentencing issues blanket sentences without regard for the person in the courtroom.⁷² While on its face this seems consistent, on application it is inconsistent because it does not account for the mitigating factors that judges in the past utilized in order to fairly mete out sanctions.⁷³ Miller argues that the specific facts of each case need to be addressed on an ad hoc basis to ensure fairness:

The "nature and circumstances of the offense and the history and characteristics of the [offender]" determine the offender's culpability, blameworthiness, potential to cause additional harm, and capacity for rehabilitation. . . . [C]ontextual information concerning whether the offense is increasing in frequency, public concern in a particular locale, and whether punishing the defendant will cause special harm to others, such as family or employees, may be relevant to sentencing.⁷⁴

⁶⁹ Stuart Taylor, Jr., *How a Racist Drug War Swells Crime*, LEGAL TIMES, Feb. 22, 1993, at 35.

⁷⁰ *Id.*

⁷¹ "Ad hoc decisionmaking and lack of uniformity inevitably lead to sentence disparities, regardless of who makes the decisions; prosecutors, no less than judges, are susceptible to arbitrariness when exercising unguided discretion. . . . The most troubling aspect of this disparity is that sentences are based partially on whether defendants exercise their constitutional right to trial." Lowenthal, *supra* note 26, at 108.

⁷² See Michael Tonry, *Twenty Years of Sentencing Reform: Steps Forward, Steps Backward*, 78 JUDICATURE 169, 170 (Jan.-Feb. 1995); Hatch, *supra* note 24, at 194.

⁷³ "Mandatory sentencing laws inherently result in unwarranted disparities. . . [because there is no] regard to the total mix of aggravating and mitigating circumstances present in individual cases." Lowenthal, *supra* note 26, at 66. It is also argued that mandatory minimums place too much control over sentencing in the hands of legislatures. Sauer, *supra* note 10, at 1240. Mandatory minimums are generally enacted as passionate political responses to a few highly publicized offenses or a perceived generalized frustration with crime. *Id.* at 1240-41. The result is a "majoritarian oppression where the just punishment of some comes only at the expense of the unjust punishment of others." *Id.*

⁷⁴ Miller, *supra* note 14, at 464.

Thus, while mandatory sentencing seeks consistency with blanket sentences, it is equally unfair because it fails to account for significant mitigating factors. Because neither full discretion nor mandatory minimums reduce the inconsistencies in prison sentencing, many reformers are calling for compromise based in mandatory sentencing, but which authorizes courts to depart from them when substantial and compelling mitigating circumstances exist.⁷⁵

Second, while full judicial discretion is criticized as racist, the mandatory minimums may also be subject to the same criticism.⁷⁶ A study done by the United States Sentencing Commission indicates substantial unevenness in the imposition of federal mandatory minimum sentences.⁷⁷ Over two thirds of eligible black defendants received sentences at or above mandatory minimum levels, while only fifty-four percent of eligible whites received similar sentences.⁷⁸ Jerome Miller, president of the National Center on Institutions and Alternatives, writes, "our overcrowded prisons are less a result of rising crime, than a consequence of strategies which have focused increasingly punitive measures primarily on inner-city blacks."⁷⁹ This data suggests that mandatory sentencing in practice is inconsistent, disparate punishment.⁸⁰

Third, by eliminating judicial discretion, mandatory sentencing severs a significant safety valve inherent in the adversary system, the Sixth Amendment right to a fair trial.⁸¹ Senator Orrin Hatch embodies the problem as follows: "Perhaps the most serious criticism of the guidelines is that their compulsory nature has given prosecutors too much leverage over defendants thereby elbowing judges out of the sentencing process."⁸² The prosecutor possesses enormous plea bargaining leverage because a much stiffer sentence awaits the defendant

⁷⁵ See Hatch, *supra* note 24, at 196; Lowenthal, *supra* note 26, at 66.

⁷⁶ FORER, *supra* note 3, at 151. Following mandatory drug crime laws between 1986–91 minority adults arrested for drug crimes rose by 57 percent, whereas non-minority arrests rose by 6 percent. While one third of all persons arrested were minorities, they make up half of the prison population. Laws intended to be neutral in effect are not. See *id.*; see also Tonry, *supra* note 28, at 118 (Minority Americans are especially susceptible to prosecution under mandatory minimums).

⁷⁷ Lowenthal, *supra* note 26, at 109.

⁷⁸ *Id.* at 109–10.

⁷⁹ Taylor, *supra* note 69.

⁸⁰ See *id.*; Hatch, *supra* note 24, at 193 (current lack of uniform application may be dramatically undermining sentencing certainty).

⁸¹ Russell C. Gabriel, *A Rage To Punish*, N.Y. TIMES, August 21, 1994, § 7 (letter to the Editor), at 35.

⁸² Hatch, *supra* note 24, at 191. Mandatory minimums employ a relatively narrow approach under which the same sentence may be mandated for widely divergent cases. *Id.* at 194.

than in the past, and the likelihood of parole is either diminished or denied.⁸³ The number of trials decrease because defendants are less willing to chance a long prison term regardless of their innocence.⁸⁴ The process eliminates the judge, and the defendant loses the constitutional protection owed to him.⁸⁵ Thus, more defendants go to prison because of new-found prosecutorial power.⁸⁶ Lowenthal argues that because of the risk of long prison terms, mandatory minimums cast doubt as to whether the defendant is given his Sixth Amendment guarantee to a fair trial.⁸⁷

Finally, enormous prosecutorial plea bargaining power contributes significantly to prison overcrowding and spiralling prison costs.⁸⁸ Reformers maintain that in order to combat this problem, Congress should compromise mandatory minimums and enact laws that return a greater degree of flexibility to the judiciary.⁸⁹ This solution will ensure greater opportunity for trial, and reduce prison overcrowding and maintenance costs.

While it is true that both mandatory minimums and indeterminate sentencing practices contain elements of unfairness and racism, when forced to choose between two imperfect systems, the system that retains the most judicial discretion is preferable.⁹⁰ The most significant flaw in mandatory sentencing is the fact that it may violate the defendant's Sixth Amendment right to a fair trial. The right to a fair trial is fundamental to the American criminal justice system. Despite its flaws, allowing judicial discretion in the sentencing process protects the defendant's constitutional rights. Thus, a sentencing process that implements judicial discretion is the better system, because it protects against the greatest inequity: failure to receive a fair trial.

While *A Rage to Punish* offers novel alternative theories to our present sentencing system, research mistakes cut deeply into the credibility of Forer's theories.⁹¹ Yale Kamisar notes that Forer's interpreta-

⁸³ See FORER, *supra* note 3, at 64; Lowenthal, *supra* note 26, at 72.

⁸⁴ See Lowenthal, *supra* note 26, at 80.

⁸⁵ See Sauer, *supra* note 10, at 1240 (mandatory penalties virtually eliminate judicial discretion at sentencing); Tonry, *supra* note 72; Gabriel, *supra* note 81.

⁸⁶ See Lowenthal, *supra* note 26, at 85.

⁸⁷ *Id.* at 85-86 (when the risk of going to trial is so great that defendants are rarely willing to risk a trial, the values the sixth amendment seeks to protect are undermined).

⁸⁸ *Id.* at 85.

⁸⁹ Hatch, *supra* note 24, at 196.

⁹⁰ Tonry, *supra* note 28.

⁹¹ Kamisar, *supra* note 2.

tion that *Furman v. Georgia* declared the death penalty unconstitutional is erroneous.⁹² Kamisar writes that *Furman* held that the state's death penalty under its present arbitrary system constituted cruel and unusual punishment, but the constitutionality question of the death penalty in general was left open.⁹³ Furthermore, Forer states that the Warren court handed down *Furman*, when in actuality it was the Burger court.⁹⁴ Forer also indicates that the death penalty was restored by the Supreme Court in 1976.⁹⁵ As a result, "36 states enacted new death penalty laws."⁹⁶ However, Kamisar indicates that the Burger court did not lead the way in reviving the death penalty, thirty-six states had already instituted the death penalty prior to *Gregg v. Georgia*.⁹⁷

IV. CONCLUSION

But for the philosophy of punishing the criminal, mandatory sentencing may not be a rational choice for the criminal justice system. Mandatory sentencing contributes to prison overcrowding, exorbitant prison costs, and inconsistencies in the sentencing process which further racial discrimination and possibly infringe upon the defendant's Sixth Amendment rights. Lois Forer presents the most radical solutions to today's sentencing predicaments. While other commentators realize the inherent difficulties in reforming the politically driven system, and they couch their recommendations on compromise between the judiciary and the legislative branch, Forer advocates a complete return to judicial power. Her theory dispels the notion of punishing the offender, and it incorporates the notions of public safety, reparations to the victims, and rehabilitation of the offender. Forer's ideas are not new; rehabilitation was the norm in the 1970s and is presently practiced in Scandinavian countries. Nor are they lacking in flaws; statistics indicate full judicial discretion in sentencing may be racist. However, her theories cause the reader to pause and scrutinize the worthiness

⁹² *Furman v. Georgia*, 408 U.S. 238 (1972).

⁹³ Kamisar, *supra* note 2. "[The] majority held that [carrying out the death penalty under] the then arbitrarily and randomly administered system constituted cruel and unusual punishment. The pivotal opinions of Justices Potter Stewart and Byron White left open the question of whether any system of capital punishment, as opposed to the capriciously administered one before the court, would be unconstitutional." *Id.*

⁹⁴ *Id.*

⁹⁵ *Gregg v. Georgia*, 428 U.S. 153 (1976).

⁹⁶ FORER, *supra* note 3, at 101.

⁹⁷ Kamisar, *supra* note 2.

of mandatory sentencing laws. While my fourth grade principal may have had the right theory for elementary school justice, the intricacies of today's justice system demand much greater care than "three strikes and you're out." Like a screaming line drive hit at the reader, *A Rage to Punish* surely does not strike out, rather, it forces us to react to serious problems inherent in today's criminal justice system.